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Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 December 2010)

Contents

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I. Introduction

1. At its thirty-third session (New York, 12 June-7 July 2000), the Commission held a preliminary exchange of views on proposals to include online dispute resolution in its future work programme.[1] At its thirty-fourth[2] (Vienna, 25 June-13 July 2001) and thirty-fifth[3] (New York, 17-28 June 2002) sessions, the Commission decided that future work on electronic commerce would include further research and studies on the question of online dispute resolution and that Working Group II (Arbitration and Conciliation) would cooperate with Working Group IV (Electronic Commerce) with respect to possible future work in that area. At its thirty-ninth (New York, 19 June-7 July 2006) to forty-first (New York, 16 June-3 July 2008) sessions, the Commission took note of suggestions that the issue of online dispute resolution should be maintained as an item for future work.[4]

2. At its forty-second session (Vienna, 29 June-17 July 2009), the Commission had heard a recommendation that a study should be prepared on possible future work on the subject of online dispute resolution in cross-border electronic commerce transactions, with a view to addressing the types of e-commerce disputes that might be solved by online dispute resolution, the appropriateness of drafting procedural rules for online dispute resolution, the possibility or desirability to maintain a single database of certified online dispute resolution providers, and the issue of enforcement of awards made through the online dispute resolution process under the relevant international conventions.[5]

3. At its forty-third session (New York, 21 June-9 July 2010), the Commission had before it a note by the Secretariat on the issue of online dispute resolution which summarized the discussion at a colloquium organized jointly by the Secretariat, the Pace Institute of International Commercial Law and the Penn State Dickinson School of Law (A/CN.9/706).[6] The Commission also had before it a note from the Institute of International Commercial Law in support of possible future work by UNCITRAL in the field of online dispute resolution reproduced in document A/CN.9/710.

4. At that session, after discussion, the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.[7] It was also agreed that the form of

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[1] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 385.

[2] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 287 and 311.

[3] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 180 and 205.

[4] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 183 and 186-187; *Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), para. 177; and *Sixty-third Session, Supplement No. 17* (A/63/17), para. 316.

[5] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 338, and A/CN.9/681/Add.2, para. 4.

[6] The Colloquium, entitled "A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)" was held in Vienna, on 29 and 30 March 2010.

[7] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

the legal standard to be prepared should be decided after further discussion of the topic.

5. A detailed compilation of historical references regarding the consideration by the Commission of the current work of the Working Group can be found in document A/CN.9/WG.III/WP.104, paras. 5 to 11.

II. Organization of the session

6. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-second session in Vienna from 13 to 17 December 2010. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Belarus, Bolivia (Plurinational State of), Canada, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Honduras, India, Iran (Islamic Republic of), Israel, Italy, Japan, Mexico, Nigeria, Philippines, Republic of Korea, Russian Federation, Spain, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Ecuador, Indonesia, Panama, Slovakia, Slovenia, Sudan and Yemen.

8. The session was also attended by observers from the following international organizations:

(a) *Invited intergovernmental organizations*: European Commission;

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), American National Standards Institute (ANSI), Asian Domain Name Dispute Resolution Centre (ADNDRC), Asociación Americana De Derecho Internacional Privado (ASADIP), Business Software Alliance (BSA), Center for International Legal Education (CILE), Centre de Recherche en Droit Public (CRDP), Council of Bars and Law Societies of Europe (CCBE), European Legal Studies Institute, Institute of Commercial Law (Penn State Dickinson School of Law), Institute of Law and Technology (Masaryk University), Internet Bar Association (IBO), Madrid Court of Arbitration, Pace Institute of International Commercial Law, and Swiss Arbitration Association (ASA).

9. The Working Group elected the following officers:

Chairman: Mr. Soo-geun OH (Republic of Korea)

Rapporteur: Mr. Tunde BUSARI (Nigeria)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.104); and

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions (A/CN.9/WG.III/WP.105).

11. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Consideration of the preparation of legal standards on online dispute resolution for cross-border electronic commerce transactions.

5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group engaged in discussions on the preparation of legal standards on online dispute resolution for cross-border electronic commerce transactions on the basis of document A/CN.9/WG.III/WP.105. The deliberations and decisions of the Working Group on that topic are reflected in Section IV below.

IV. Preparation of legal standards on online dispute resolution for cross-border electronic commerce transactions

13. The Working Group discussed legal standards on online dispute resolution (ODR) on the basis of document A/CN.9/WG.III/WP.105 and other documents referred to therein.

A. General remarks

14. The Working Group recalled the mandate of the Commission that work on that topic should focus on ODR relating to cross-border e-commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.[8]

15. In response to a question as to how ODR relates to the work of Working Group II on arbitration and conciliation, it was explained that there was no overlap of the work of Working Group III with any ongoing work of Working Group II, which was currently exploring the issue of transparency in investor-State arbitration and could be expected subsequently to consider issues in the field of international commercial arbitration. It was indicated that ODR raised separate issues, particularly those associated with the need for rapid resolution of high-volume, low-value disputes arising primarily from transactions carried out by way of electronic communications, and for that reason the Commission deemed it appropriate to task a separate working group with the ODR subject.

16. The view was generally shared that there was an absence of an agreed international standard on ODR, and that a need existed to address in a practical way disputes arising from the many low-value transactions, both B2B and B2C, which were occurring in very high-volumes worldwide and required a dispute resolution response which was rapid, effective and low-cost. In that regard, many delegations voiced the view that traditional dispute resolution mechanisms, including litigation

[8] Ibid.

through the courts, were inappropriate for addressing these types of disputes, being too costly and time-consuming in relation to the value of the transaction. The view was also expressed that enforcement of awards cross-border was difficult if not impossible in light of the lack of treaties providing for cross-border enforcement of awards in B2C transactions.

17. There was general agreement that any standard considered by the Working Group should become, as appropriate, consistent with existing UNCITRAL standards in arbitration, conciliation and electronic commerce.

18. It was pointed out that levels of knowledge and experience with electronic commerce and ODR varied greatly from State to State, and that the work should take account of that fact. It was also suggested that the Working Group's recommendations on ODR must be flexible in order to accommodate the differing circumstances of States, including: differences in culture and level of economic development; and the fact that the meaning of a "low value" transaction might differ from State to State.

19. It was also noted that consumer protection was an important public policy consideration, that legislation in that field was highly specific to particular States, and that care should be taken that any approach to ODR not detract from consumer rights at the national level. The Working Group recalled the Commission's decision in that regard.[9]

20. It was felt that the form of the work product to be produced (whether a model law, set of rules, guidelines or otherwise) could be addressed at a later stage, once the substantive issues relating to ODR had been addressed.

21. Without prejudice to the above, it was suggested that production of four instruments might be considered: fast-track procedural rules which complied with due process requirements; accreditation standards for ODR providers;[10] substantive principles for resolving cross-border disputes; and a cross-border enforcement mechanism.

22. Among the challenges mentioned were language differences between States and the need for ODR users to be able to communicate effectively during the process in their own language. One delegation pointed out that a new communications standard was being developed: E-Commerce Claims Redress Interchange (ECRI), which would facilitate the filing of cases by consumers and the subsequent dialogue between the parties in a multilingual environment.

23. Other issues raised included: how a global ODR system would be funded (and indeed whether States would be willing to fund it); and, in the context of enforcement and the validity of the arbitration agreement, whether the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[11] was appropriate and applicable to those ODR cases

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[9] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 256.

[10] "ODR provider" means an intermediary that administers the process and provides an ODR online platform for the parties to resolve their dispute by their chosen resolution method. See A/CN.9/WG.III/WP.105, paragraph 21.

[11] United Nations, *Treaty Series*, vol. 330, No. 4735.

leading to an arbitral award, as they dealt with disputes involving consumers. Reference was made to treaty obligations under the New York Convention.

B. Examples of online dispute resolution models and systems (A/CN.9/WG.III/WP.105, paras. 5-10)

24. The Working Group took note of the examples provided in document A/CN.9/WG.III/WP.105. Several delegations described national and regional ODR models and their characteristics. It was explained that ICA-Net was a regional complaint-handling mechanism in the Asian region which was successful in resolving low-value B2C transactions. Some States also referenced eConsumer.gov and ECC-Net, which both maintained lists of ODR providers. Other ODR models, at the national level, were outlined and suggested as good examples. The experience of some States of empowering local judges to engage in conciliation of low-value disputes was described as frequently leading to resolutions that kept the cases out of the courts.

25. One conciliation model, comprising several steps, was introduced: a party accessed an Internet web page and registered; the party then provided personal data and went on to describe the grievance, all of which information was encrypted; within five working days, the ODR provider notified the party by e-mail as to the next step in the process; a day of hearings via ODR online platform followed, which involved virtual sessions between the parties and between a party and the conciliator; the outcome of the process was not binding. A key advantage of this process was said to be its easy availability to parties wishing to use it.

26. Another model presented (and referred to in para. 10 of A/CN.9/WG.III/WP.105) was that of the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association (AAA), which had set up a pilot project for manufacturer/supplier ODR. A case was initiated using AAA WebFile, an online platform for submitting complaints. The respondent had 12 days to respond and state any counterclaim, to which the claimant had a further 12 days to respond. Online negotiation then took place for 12 days. Where no settlement was reached, the arbitration phase commenced and a technical specialist (i.e. non-lawyer) was appointed as arbitrator, who then considered the case based on the documents submitted and rendered an award within 30 days after being appointed.

27. In a few States, so-called “chargebacks”, whereby in the case of consumer complaints credit card companies could refund purchase money to consumers where the transaction had been completed with a credit card, were also said to enjoy a high rate of success in resolving disputes. However, it was pointed out that this system would not work in jurisdictions where the necessary obligation of the credit card company to the cardholder was not mandated in relevant legislation, or in cases where payment was made by means other than credit card (e.g. wire transfer, debit card, cheque). It was also pointed out that, according to studies, the use of credit cards was decreasing worldwide and the use of mobile payments had increased dramatically.

28. After discussion, it was noted that the ODR process could be seen as having several phases: a negotiation phase, a conciliation phase and an arbitration phase.

29. Several delegations pointed to the value of including complaint-handling mechanisms and trustmarks in ODR. It was said that complaint-handling, negotiation and conciliation were methods of amicably resolving disputes that had proven to be very effective. It was also noted that the Working Group could derive useful lessons even from highly specialized ODR models, such as those dealing with Internet domain name disputes. In addition to Better Business Bureau (BBB) and Euro-Label mentioned in para. 5 of A/CN.9/WG.II/WP.105, it was suggested that the experience of TRUSTe, another widely known trustmark, might be relevant.

30. Delegations stressed the importance of emphasising negotiation and conciliation stages of ODR, which had been shown to successfully resolve the majority of cases before they reached arbitration or the courts. The example was given of a complaint-handling mechanism on eBay, which processed millions of cases per year, only a small percentage of which were unresolved. Also mentioned in this regard was Electronic Consumer Dispute Resolution (ECODIR), which was said to facilitate negotiation between buyer and seller and to result in a 70 per cent success rate without involvement of a mediator, which rose to 95 per cent once a mediator joined the process, leaving only a small percentage of cases to be dealt with by arbitration. It was agreed that arbitration was a necessary component of ODR (since without it there could be no final resolution of those cases which were not settled in earlier stages) but several delegations urged that in any ODR most disputes would need to settle prior to the arbitration phase so that arbitration would occur in only a small percentage of cases that could not be resolved otherwise.

C. Standards on online dispute resolution (A/CN.9/WG.III/WP.105, paras. 11-18)

1. Existing standards (A/CN.9/WG.III/WP.105, paras. 11-16)

31. The Working Group took note that there were no recognized legal standards on cross-border ODR.

32. Additional texts were suggested as referring to core principles of ODR that the Working Group could consider: American Bar Association Task Force on E-commerce and ADR, Recommended best practices for online dispute resolution service providers;[12] Final Report and Recommendations of the American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution, Addressing Disputes in Electronic Commerce;[13] Alternative Dispute Resolution Guidelines Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce ("GDBe-Consumers International Agreement");[14] International Chamber of Commerce, Resolving disputes online, Best practices for Online Dispute Resolution (ODR) in B2C and C2C transactions 2003;[15] European Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes;[16] and European Commission

[12] www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf.
[13] www.abanet.org/dispute/documents/FinalReport102802.pdf.
[14] www.gbd-e.org/pubs/ADR_Guideline.pdf.
[15] www.iccwbo.org/uploadedFiles/ICC/policy/e-business/pages/ResolvingDisputesOnline.pdf.
[16] COM (1998) 198 final — Official Journal L 115 of 17.4.1998.

Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation 98/257/EC.[17]

33. The Working Group was also referred to deliberations of the 11th Annual Summit of the Global Business Dialogue on e-Society (GBDe) held on 5 November 2009 in Munich, Germany and a colloquium on ODR and Consumers 2010 held on 2-3 November 2010 in Vancouver, Canada.[18]

2. Standards under consideration (A/CN.9/WG.III/WP.105, paras. 17-18)

34. Proposals made to the Organization of American States (OAS) were also mentioned in order to inform and assist future deliberations of the Working Group. In this regard, one delegation requested that the draft Convention on Consumer Protection and Choice of Law, submitted in the framework of the OAS, be included among the reference materials for the Working Group. Some delegations were of the view that regional instruments were not considered relevant in an international negotiation. It was also noted that the "Blue Button" concept (para. 18 of A/CN.9/WG.III/WP.105) was not an ODR proposal per se, although it was a supporting instrument which could be useful in the development of legal standards applicable for ODR.

D. Issues for possible consideration (A/CN.9/WG.III/WP.105, paras. 19-90)

1. Definitions (A/CN.9/WG.III/WP.105, paras. 19-23)

35. Some delegations regarded the definition of ODR contained in paragraph 20 of A/CN.9/WG.III/WP.105 as overly broad, and suggested that ODR be limited to instances where procedural aspects of a case are conducted online.

36. It was also noted that, to the extent any standard resulting from the current work would be a non-binding one, then a broad definition would be appropriate since parties could elect to use it or not.

37. There were several other suggestions: that the phrase "in whole or in part online" was ambiguous, in that "in part" should be defined; that the definition should emphasize the automated and streamlined processes made possible by technology, and stress the cross-border nature of the disputes being resolved; that the definition should distinguish ODR from traditional dispute resolution modes that made use of information and communications technology; to foresee the use of information and communications technology in traditional judicial systems as well; that a broad-based definition should accommodate the resolution of cases that arose off-line as well as those stemming from online transactions.

38. There was broad agreement that any definition be open enough not to exclude relevant technological developments which might arise in future, and should preserve the principle of technological neutrality.

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[17] COM (2001) 161 — Official Journal L 109 of 19.4.2001.

[18] www.odrandconsumers2010.org/.

39. A series of questions were proposed which, it was said, could assist in clarifying the parameters of ODR by eliciting information on such matters as: the types of disputes being dealt with; the parties; whether the case was domestic or cross-border; the value at stake; which (if any) neutral would facilitate resolution and whether for a fee or gratis; how parties accessed the neutral and how the neutral would deal with the dispute; the end result (consensus agreement or award); and the effect of no successful result being reached.

40. There was broad agreement that consideration of a definition of ODR could more usefully be deferred to a later point in the discussion, when the components of the concept had been more fully elaborated.

2. Scope of work (A/CN.9/WG.III/WP.105, paras. 24-27)

41. Delegations took note of the mandate given to the Working Group by the Commission.[19] A suggestion was also made that any standard should also apply to consumer-to-consumer (C2C) transactions, between private non-commercial parties. It was noted that at the forty-third session of the Commission, States had agreed that traditional judicial mechanisms did not work for high-volume, low-value disputes resulting from a cross-border e-commerce transaction, hence the request to this Working Group to devise an appropriate model for dispute resolution.

42. Several delegations emphasized the importance of non-interference with the rights of consumers under national consumer protection laws (one reason for this being to inspire a climate of confidence in ODR among consumers) and that it was not within the remit of the Working Group to address harmonization of national consumer protection laws. Several delegations expressed the view that the goal of the current work was to create a separate global system for the resolution of cross-border disputes involving B2B and B2C transactions. Those delegations were of the view that in the case of high-volume, low-value cross-border transactions, consumers were unlikely to exercise any rights they might have as the cost of doing so was prohibitive in relation to the value of the purchase and in any event it would be difficult if not impossible to enforce the award. It was pointed out that, at present in the case of most cross-border consumer transactions, consumers had, in practice, no rights and so the creation of an ODR standard could have the effect of creating such rights.

43. The point was made that with the use of "amicable" resolution methods such as complaint-handling, negotiation and conciliation, parties would be freely consenting to a settlement and thus their rights under consumer laws would not be imperilled. Some delegations were of the view that in the case of arbitration, however, a standard would be needed to preserve the protections of consumer laws and this raised the larger question of what would be the applicable law in an ODR arbitration. In this regard the question was asked whether the Working Group could devise a simpler enforcement mechanism than that provided by the New York Convention, given the low-value of the transactions involved and the need for a speedy resolution. It was also suggested that an ODR standard might embody "core principles" of consumer protection law.

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[19] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

44. A further suggestion was made that consumers might be offered a choice between proceeding to arbitration under the terms of an arbitration agreement or relying on their own consumer protection laws, and that such an option might work, without infringing the consumer's rights under applicable law.

45. In response, it was suggested that, in the European Union, the Rome I Regulation[20] might invalidate such an option since it mandated the law of the consumer's jurisdiction as the applicable law; hence, conflict of laws considerations might have to be taken into account when considering such an option. It was observed that an option such as the "Blue Button" proposal might be worth exploring as a solution to the applicable law issue, since a multiplicity of applicable laws might discourage the growth of electronic commerce. In this regard, the point was made that small business vendors were unwilling to sell cross-border in Europe due to the restrictions imposed by the Rome I Regulation, and the "Blue Button" was designed to provide consumers with the ability to secure a wider range of products and lower prices.

46. Some delegations suggested that an ODR standard could usefully mandate ODR providers to report suspected fraud or other illegal conduct by vendors to law enforcement authorities, as suggested in the GDBe — Consumers International Agreement.

47. A suggestion to avoid obstacles mentioned was that ODR could be limited in its application to certain types of disputes that did not generate the controversies discussed; this might in fact constitute the majority of cases.

48. After discussion it was concluded that the focus of the Working Group should be on resolution of high-volume, low-value disputes and that any rules devised would likely affect consumers but should not infringe their rights under consumer protection laws.

3. Identification and authentication (A/CN.9/WG.III/WP.105, paras. 28-31)

49. The discussion highlighted that the low-value of the transactions and the need for speedy resolutions indicated that complex identification and authentication provisions (paras. 28-31 of A/CN.9/WG.III/WP.105) might not be necessary. In that regard, reference was made to article 7 (2) (b) of the UNCITRAL Model Law on Electronic Commerce (MLEC): that identification and authentication methods should be reliable and appropriate for the purposes for which they were used. It was concluded that further discussion of these matters could be deferred to a later point in the deliberations.

4. Commencement of proceeding (A/CN.9/WG.III/WP.105, paras. 32-36)

50. Several delegations supported the notion that any dispute resolution agreement (para. 35 of A/CN.9/WG.III/WP.105) should be flagged to make it very clear to the consumer what obligations he/she was taking on and the implications of any choice of law being made (particularly where it was not the law of the consumer's own

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[20] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

jurisdiction), and also that such an agreement should be separate from the main provisions of the contract to better draw the consumer's attention to it.

51. One view was that once conciliation commenced, parties should be free to consent to convert the process to arbitration, though in response it was noted that where conciliation had not worked it was rare that parties would wish to move on to arbitration.

52. One delegation indicated that some national consumer protection laws might provide that consumers were not bound by arbitration agreements entered into before a dispute arose. The understanding of the Working Group was that the vast majority of national consumer protection laws allowed consumers to enter into arbitration agreements before a dispute arose.

53. One approach suggested was that vendors be bound by an arbitration agreement from the time it was entered into, but that consumers could be given the option to be bound by it only after the dispute arose. Another approach put forward was that both parties to the dispute could "opt-in" to an arbitration agreement, in that way making clear the stage at which the arbitration agreement became applicable. It was indicated that a number of States required clear and adequate notice of the arbitration and its consequences in a B2C transaction, including a statement of its mandatory or optional character, and/or that the pre-dispute agreement to arbitrate be contained in a separate instrument in order to ensure that the consumer has made an informed choice.

54. The idea was expressed that consumer protection agencies might assist or represent consumers entering into the dispute resolution process, particularly to help those inexperienced with the workings of ODR.

55. It was widely agreed that the aim should be to formulate simple, user-friendly generic rules that reflected the low-value of claims involved, the need for a speedy procedure, and that emphasized conciliation since the majority of cases were resolved at that stage.

56. It was suggested that forms of communication for starting the process and communicating during it should adhere to the principle of technological neutrality.

57. The Working Group was also apprised of the work of other bodies in this area which might be helpful in its further deliberations, including: the 2007 report of the Association of Southeast Asian Nations (ASEAN) Coordinating Committee on Consumer Protection technical meeting that addressed the issue of cross-border redress mechanisms, including commencement of proceedings.

5. Submission of complaint, statements and evidence (A/CN.9/WG.III/WP.105, paras. 37-42)

58. A number of observations were made regarding submission of complaint, statements and evidence, including: that no rule should preclude the use of technology or dispute resolution methods that might be developed in the future; that time periods for filing of documents and evidence should be kept short so as to ensure a speedy procedure; and that one option might be to follow the example of the WIPO Electronic Case Facility (WIPO ECAF), which was designed to expedite proceedings. (This facility allowed all actors in a case to submit communications electronically to an online docket. Parties received e-mail alerts of any such

submission being made and had an opportunity to view and search the docket at any time.)

59. With regard to the admissibility of evidence, it was pointed out that under the laws of some jurisdictions, evidence in electronic form was not admissible and that this should be borne in mind in the development of legal standards.

60. The issue was raised as to the possible liability of an ODR provider to ensure proper and timely exchange of documents between parties during the proceedings.

6. Number and appointment of conciliators or members of the arbitral tribunal (A/CN.9/WG.III/WP.105, paras. 43-45)

61. In this area, it was suggested to have a rule to address situations of deadlock where the parties could not agree on a sole arbitrator. That raised the question as to who would make the appointment in such cases; possible answers included relying on consumer protection authorities or drawing from a list maintained by the ODR provider (which the provider might keep private or make public). Overall, it was agreed that the paramount concern was to ensure impartiality and professionalism of the arbitrator.

62. A rule that, in the absence of an agreement by the parties otherwise, there should be a sole arbitrator, was generally agreed to, in light of the low-value of the disputes and the need for speedy process.

63. There was consensus that conciliators or members of the arbitral tribunal ("neutrals") ought not necessarily to be lawyers, although they should be required to have relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question.

64. Also, in the interests of speed, some favoured a rule that neutrals be nominated by the ODR provider. In this regard, it was noted that care should be taken to ensure that the ODR provider, in exercising this role, did so in a transparent and even-handed manner.

65. The need for an accreditation system for neutrals was highlighted. Two phases were suggested: first, an initial accreditation stage focusing on technical experience and experience in dispute resolution; second, a periodic review involving feedback from ODR users to ensure that neutrals continued to be qualified for their roles and were discharging them in a fair manner. Reference was made to the Independent Standards Commission of the International Mediation Institute, which had established an international certification scheme for neutrals.

7. Impartiality and independence of conciliators or members of the arbitral tribunal (A/CN.9/WG.III/WP.105, paras. 46-47)

66. There was broad agreement on several basic principles, namely that independence, neutrality and impartiality were essential attributes for any arbitrator, and that transparency of the arbitration process and of the operations of the ODR provider were crucial to ensure user confidence in ODR. This was thought to be particularly true in the context of ODR, which involved processes in which the parties did not meet face to face. The need for requiring a statement of availability from the arbitrators, in which they would indicate that they are in a position to be

available to assume their duties in a timely manner, and to remain engaged throughout the process, was also stressed.

67. Codes of conduct for neutrals were felt to be important, and some existing standards were referred to as potentially helpful references in that regard, including the American Bar Association Task Force on E-commerce and ADR, "Recommended Best Practices for ODR", and the European Code of Conduct for Mediators 2004.[21]

68. It was emphasized by some delegations that disclosure of any relationship that would compromise impartiality was an important factor, as was disclosure of the remuneration paid to the neutral and transparency with regard to payment arrangements.

69. The impartiality of ODR providers was felt to be equally important, given that they might be suggesting or appointing neutrals and could have a supervisory role over the proceedings. The fact that providers might be financed by business interests was thought to be a significant matter for disclosure, in the interests of transparency.

70. It was noted that providing an opportunity for parties to challenge the appointment of neutrals should be considered, and that one model provided a mechanism for such challenges to be made within 15 days of the notice of appointment (ICDR)[22] and another within 48 hours (OAS/ODR proposal).

71. Other suggestions were that: providers be given the authority to replace neutrals who were not fulfilling their duties and that a form of declaration by neutrals as to their impartiality be included as an annex to any set of rules.

8. Confidentiality and issues related to security of communications (A/CN.9/WG.III/WP.105, paras. 48-50)

72. Several delegations expressed support for allowing exceptions to complete confidentiality of ODR arbitration awards, given that disclosure of arbitration outcomes was becoming more common and in light of the desirability of establishing a body of precedent for the guidance of future ODR parties and neutrals. Examples of databases containing summaries of dispute resolution decisions were referred to, including: Case Law on UNCITRAL Texts (CLOUT), the Court of Arbitration for Sport and the ICANN UDRP cases of the WIPO Arbitration and Mediation Center.

73. In one delegation's view, if any rules devised were to be simple in form and therefore subject to much interpretation (and if many neutrals might be non-lawyers), access to case precedents would be necessary in order to support consistency of application of the rules in ODR cases.

74. Another advantage noted for making results of arbitrations available would be to alert the public to possible questionable business practices and practitioners. In this regard, it was noted that if a vendor failed to implement an award against her/him, publication might serve as an inducement to that vendor to do so.

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[21] http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

[22] ICDR International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), Rules Amended and Effective June 1, 2009, Fee Schedule Amended and Effective June 1, 2010.

75. It was felt that disclosure of award information would also promote use of ODR as its practices and results became known, and in this context the example of ICANN UDRP was referred to. It was also recognized that publication of statistics on cases would be useful for purposes of monitoring the use of ODR and how well it was functioning.

76. It was observed that, unlike regular commercial arbitration where parties could choose litigation instead, consumers had no such choice in practice in cross-border low-value cases and so ODR would be their only option. This was suggested as a further reason why arbitration outcomes should be published, subject to the safeguards noted by some delegations.

77. As to the extent of disclosure of information on awards, it was felt that the privacy of parties could be safeguarded by keeping their names and other identifying information and private data out of the published case results. There was a general consensus that some disclosure of arbitration outcomes was useful so long as necessary safeguards relating to personal data and the parties wishes with respect to confidentiality were put in place.

78. As to conciliation, there was general agreement that conciliation discussions and outcomes would remain private, recognizing that the conciliation process was based on agreement between the parties. Such privacy could act as an incentive to parties to choose conciliation.

79. A question arose as to the point at which the duty of confidentiality attaches, and whether a provider could disclose statistics to show that a vendor had been taken to an ODR process many times. The latter could be useful public information, but it was queried whether such disclosure violated the principle of provider neutrality.

80. Other matters raised included: possible development of categorization criteria to be used by ODR providers and a standardized format for summarizing cases to enable searching of precedents; a question as to how, in a cross-border negotiation or conciliation, parties could be required to keep confidential the information that they received.

81. The tension between confidentiality and transparency, and the need to strike a balance between them, was regarded as an important issue. With regard to formulating a standard on confidentiality, reference was made to the International Law Association report on “Confidentiality in International Commercial Arbitration”. It was noted that these standards were however developed in the context of high-value commercial arbitration.

82. It was agreed that standards of security of data exchange for ODR providers should be high to prevent unauthorized accessing of data, whether for commercial purposes or otherwise. Reference in this regard was made to ISO 27001 and 27002 as possible standards.

9. Communication between the conciliators or members of the arbitral tribunal and the parties (A/CN.9/WG.III/WP.105, paras. 51-58)

83. Some delegations expressed the view that it was not necessary to consider the matters raised in this section of the paper for the purposes of an ODR standard. It was said that each provider would have its own rules and the integrity of the process

would not be adversely affected thereby. In particular, technical rules regarding dispatch and receipt of electronic communication would likely not be needed in an ODR context, as the ODR online platform[23] would convey all relevant information to parties in a timely manner. It was recalled that the MLEC and Model Law on Electronic Signature (MLES) principles cited applied unless the parties agreed otherwise, and thus party autonomy should be respected.

84. Another view was that cross-border ODR would be a significant user of information and communications technology and that a common protocol on technology issues would be helpful. It was noted that it might be desirable to have a single gateway to the ODR online platform for consumers and vendors, in order to avoid any confusion caused by different interfaces.

85. After discussion, it was agreed that the issues raised in this Section were more technical than legal and need not occupy significant time of the Working Group. It was felt that the underlying principles of UNCITRAL texts in electronic commerce should be respected, and that any further consideration of communication issues could be taken up at a later stage once deliberations had progressed further.

10. Hearings (A/CN.9/WG.III/WP.105, paras. 59-62)

86. Several observations were made: that records in ODR need only be kept in electronic form; that any rules which may be drafted should remain open and flexible on the subject of hearings; and that in successful ODR models, such as ICANN UDRP, hearings were not provided for except in a small category of exceptional cases.

11. Representation of the parties and assistance (A/CN.9/WG.III/WP.105, para. 36)

87. Overall, it was agreed that parties should have a right to be represented or assisted by third parties in the ODR process. It was noted that consumers might seek help in accessing an ODR online platform and presenting their case, perhaps from domestic consumer organizations — whose personnel may or may not be lawyers — or from an ODR provider in their own country, including assisting them to overcome any language difficulties in accessing an ODR online platform. With regard to help from an ODR provider, it was questioned whether this might run contrary to the need for ODR providers to remain neutral.

88. One suggestion was to make it obligatory that a consumer disclose when he/she was assisted informally by a third party. It was questioned how ODR would deal with situations where a party's representative was found to have a conflict of interest. It was recalled that an ODR online platform should be as user-friendly as possible, thus minimizing the need for parties to retain counsel, since the costs of representation would in most cases be out of proportion to the value of the dispute.

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[23] "ODR online platform" refers to a forum provided by the ODR provider. An ODR online platform may be a platform accessible to the public such as websites on the Internet (an open platform) or a platform with limited or restricted access such as Intranet or internal electronic file management system (a closed platform). See A/CN.9/WG.III/WP.105, paragraph 23).

12. Place of arbitration (A/CN.9/WG.III/WP.105, paras. 64-65)

89. While it was broadly agreed that the place of arbitration was a crucial consideration for the reasons stated in paragraph 65 of A/CN.9/WG.III/WP.105, a variety of views were offered on what that place might be. The basic rule was understood to be that it was the choice of the parties. In addition, it was said that no State had laws preventing the parties from voluntarily entering into an agreement concerning the place of arbitration. Some delegations expressed caution, however, that, in cases involving consumers and large companies, there was an inequality of bargaining power and a consumer could not be said in those circumstances to be giving true consent. On the issue of party agreement, it was suggested that if any rules set for ODR specified a place of arbitration, and if parties chose to use an ODR online platform, then they would have accepted that place voluntarily by "opting in" to the online platform.

90. Failing agreement by the parties, some delegations favoured the place of arbitration being the jurisdiction of the consumer, since it would offer the protection of his/her national consumer protection law and the ability to have any award certified in the consumer's home courts. Another view was that the vendor's jurisdiction was to be preferred, since this would remove the need for a consumer to apply in a foreign jurisdiction for enforcement of an award made in his own jurisdiction; instead, the consumer could simply seek enforcement of the award in the courts of the country where it was made and where the vendor and its assets were located.

91. One delegation suggested, that if the arbitrator were to decide the place of arbitration, this being the default rule in the absence of agreement by the parties, then the selection might simply be the place where the arbitrator was most familiar with the law, which might not be the most suitable choice for the parties.

92. Another suggestion was to provide for a single place of arbitration for all cases globally, thus eliminating disputes over jurisdiction and ensuring a consistency in the application and development of the law on ODR. In this regard, it was pointed out that a jurisdiction where the arbitration laws, legal framework and court system were favourable to efficient handling of such matters would be the most suitable choice. An example of such an approach was given: the Court of Arbitration for Sports in Lausanne, Switzerland.

93. It was recalled that, according to Article 6 of the Electronic Communication Convention, the location of equipment and technology supporting an information system did not by itself establish the location of a contract, and by analogy the place of arbitration could not be ascertained from the location of the ODR provider or its equipment, which could indeed be located in a variety of jurisdictions simultaneously. A view was also expressed that place of arbitration could be where the contract was executed.

94. Some delegations suggested that a focus on the location of the vendor or the consumer was unhelpful and that new thinking was needed on the subject of place of arbitration, given the proposed global nature of ODR, the multiplicity of jurisdictions and the need to have a simple and speedy process which was commensurate with the low-value transactions at stake. Any new rules drafted should reflect this approach. One suggestion would be to remove the concept of

place of arbitration from any national jurisdiction, following the approach used in International Centre for Settlement of Investment Disputes (ICSID) arbitrations.

95. The question was raised as to the applicability of the New York Convention in this regard, discussion of which was deferred until the Working Group considered the enforcement issue.

96. Overall, there was agreement on the need to make rules in this regard simple and consumer-friendly, and to keep an open mind on the issue for future consideration.

13. Settlement agreement and termination of the proceedings (A/CN.9/WG.III/WP.105, paras. 66-67)

97. It was noted that national approaches to enforcing compliance with settlement agreements varied, including enforcing such agreements as contracts or using them as a basis to proceed to an arbitration award which could then be enforced. The view was expressed that the Working Group should consider ways in which compliance with settlement agreements could best be enforced, with the proviso that any solution be focused on expediting the process.

14. Enforcement issues (A/CN.9/WG.III/WP.105, paras. 68-75)

98. It was said that enforcement was less of an issue in cases dealt with through conciliation, which was in fact the majority of high-volume, low-value transaction cases, and so the discussion focused on arbitral awards. There was a general consensus that it could be assumed the New York Convention would be applicable to enforcement of arbitral awards under ODR cases in B2B and B2C cross-border disputes, but that reliance on that mechanism alone was insufficient. Discussion then centred on other options that might be used to enforce awards in a more practicable and expedited fashion. One option was to emphasize the use of trustmarks and reliance on merchants to comply with their obligations thereunder. Another was to require certification of merchants, who would undertake to comply with ODR decisions rendered against them. In that regard, it was said to be helpful to gather statistics to show the extent of compliance with awards. Finally, it was stressed that an effective and timely ODR process would contribute to compliance by the parties.

99. It was generally agreed that ODR arbitral decisions should be final and binding, with no appeals on the substance of the dispute, and carried out within a short time period after being rendered, and that further consideration of enforcement issues should be deferred until after issues of substantive and procedural rules had been addressed.

100. The Secretariat noted that, should any ODR standard be developed under which a party with an arbitral award would be provided with a specific enforcement mechanism, then Article VII (1) of the New York Convention might permit resort to such an enforcement mechanism and thus problems with enforcement through other provisions of the New York Convention might be avoided.

15. Applicable law (A/CN.9/WG.III/WP.105, paras. 76-81)

101. Many delegations supported the approach of using equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions — bearing in mind the need for a high consumer protection content — as the basis for deciding cases, thus avoiding complex problems that may arise in the interpretation of rules as to applicable law. Reference was made in this regard to the GDBe-Consumers International Agreement. It was said that in any event most of the cases dealt with in ODR could be decided on the basis of the terms of the contract, with little need for resort to complex legal principles, and that any rules devised for ODR should be simple, expeditious and flexible. Some delegations characterized the need as being for a body of general legal principles applicable to a limited fact-based system, which would avoid having to deal with issues of applicable law and jurisdiction.

102. Reference was made to the joint proposal put forward by Brazil, Argentina and Paraguay to the OAS Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII). It was suggested that the principles set out therein, which referred to applicable law being that most favourable to the consumer, should be considered.

103. It was suggested that the Secretariat could present options on the issue of applicable law — taking into account the suggestions that had been made during the discussion — to the Working Group at a future meeting, and also that consideration be given as to what interim measures might apply in the period before work on substantive provisions was completed.

16. Language of proceeding (A/CN.9/WG.III/WP.105, paras. 82-87)

104. There was broad agreement that the language of proceeding was an important issue in ODR and one that was closely linked to consumer protection. It was emphasized that the language of the proceeding needed to be understood by consumers, as the level of understanding required for conclusion of contracts through electronic transactions on the one hand, and for the process of ODR on the other hand, differed.

105. One option suggested was that the language of contract in an electronic transaction be presumed to be the language of the ODR proceeding. Another option was to leave the selection of language of proceeding up to the parties. It was also suggested that in cases where the parties failed to reach an agreement on the language of proceeding, it could be left to the discretion of the neutral to decide.

106. In cases where the language of proceeding was not the language of the consumer, it was noted that the ODR process should provide a simple and easy way for the consumer to understand the process. Additionally, it was noted that the language of the proceeding should be made known in advance to consumers.

107. Another matter raised was the assistance from technological solutions by which automatic translations were provided. The ECRI (see para. 22 above) was introduced as a developing solution. In that regard, a concern was raised that while these technologies might facilitate translation for grammatical and linguistic purposes, they would not provide quality translation with reference to legal terms and the legal nature of the document. In that regard, it was suggested that a legal glossary translated into various languages may be useful for facilitating the process.

17. Costs and speed of proceedings (A/CN.9/WG.III/WP.105, paras. 88-90)

108. There was broad agreement that an overall aim should be to keep costs low so that ODR was affordable to users. It was stressed that simple expedited procedures and rules would be important factors in that regard. Aspects such as allowing non-lawyers to act as neutrals, or not requiring decisions to be accompanied by reasons, were also said to be significant in cost-saving.

109. A reference was made to the need to ensure inexpensive enforcement of awards, since an award was useless without the capacity to realize on it; a question was raised as to whether the ODR provider might be able to assist in enforcement.

110. Suggestions were made on the issue of user fees, and there was substantial support for a proposal that users would pay a reasonable application fee that would serve to deter the filing of abusive claims yet not be so high as to exclude consumers. A number of delegations supported the notion that the fees could be a percentage of the value of the claim, with possibly a minimum fee and a cap or limit on the highest level of fee. One proposal was that a consumer be refunded or awarded his access fee in the event he succeeded in his claim. The need to transparently disclose to users all costs of proceeding up front was emphasized.

111. Another view was that ODR providers might compete for business, in which case market forces could work to keep costs low for users. Trustmark processes could, it was suggested, refer to the fact that merchants participated in ODR, thereby attracting consumers.

112. The issue was raised of the independence of ODR providers and neutrals, especially where providers kept lists of neutrals who they may call upon. It was said that how money flowed between providers and neutrals should be transparent, with the goal that it be in no one's financial interest to decide cases in a certain way.

113. Other suggestions as to funding were: government establishment and financial support for an ODR online platform; and funding of an ODR online platform by consumer organizations.

114. One delegation urged that the ODR system be self-sufficient and receive no external funding, and that at the same time it be efficient in order to ensure it would operate at minimum cost.

V. Future work

115. The Working Group requested that the Secretariat, subject to availability of resources, prepare the following for a future meeting:

(a) Draft generic procedural rules for ODR, including taking into account: the types of claims with which ODR would deal (B2B and B2C cross-border low-value, high-volume transactions); initiation of the online procedure; alerting parties to any agreement with regard to dispute settlement that might be entered into at the time of contracting; stages in the dispute settlement process — including negotiation, conciliation and arbitration; describing substantive legal principles, including equitable principles, for deciding cases and making awards; addressing procedural matters such as representation and language of proceedings; the

application of the New York Convention, as discussed; reference to rules of other ODR systems; setting out options, where appropriate;

(b) Draft document setting out principles and issues involved in the design of an ODR system. All documents or other references to ODR known to the Secretariat would be listed by the Secretariat with references to websites or other sources where they may be found.

116. The Secretariat advised that States might send proposals to the Secretariat for consideration in the preparation of these documents. Such proposals should be brief and could be summarized in a document which would be provided to delegates in all official languages of the United Nations. It was suggested that the Secretariat would consult with relevant NGOs and experts in the preparation of any documentation, including to the extent possible taking into account the outcomes of the 10th annual meeting of the Online Dispute Resolution Conference to be held in Chennai, India on 7-9 February 2011.[24]

117. The Working Group noted that its twenty-third session was scheduled to take place in New York from 23 to 27 May 2011.

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[24] www.odr2011.org/index.php.